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In the Supreme Court of the United States

OCTOBER TERM, 1982

NORTHERN ELECTRIC COMPANY, A DIVISION OF SUNBEAM CORPORATION,

PETITIONER,

V.

ROSE HARRELL, ON BEHALF OF HERSELF AND ALL PERSONS SIMILARLY SITUATED,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a Title VII claim of class-wide discrimination may be properly analyzed under the "disparate impact" theory where there has been neither an allegation nor evidence of an identifiable practice or policy which, although neutral on its face, allegedly falls more harshly on a minority group.

2. Whether the court of appeals properly applied this Court's decision in *Pullman-Standard v. Swint*, __ U.S. __, 102 S. Ct. 1781, 72 L.Ed. 2d 66 (1982) when it concluded that the district court's finding of no-discrimination was "clearly erroneous."

3. Whether an appellate court should make an initial determination of discrimination based upon facts and legal theories not considered by the district court, rather than remanding the case to the district court for a determination pursuant to the appellate court's rulings.

RULE 28:1 STATEMENT

Parties to this case are:

Northern Electric Company, a division of Sunbeam Corporation*

Rose Harrell, and all persons similiarly situated

*Northern Electric Company, a division of Sunbeam corporation, is a subsidiary of Allegheny International, Inc. Other Allegheny International, Inc. subsidiaries and/or affiliates (except wholly-owned subsidiaries) are Titanium Metals Corporation of American and Bra—Con Industries, Inc.

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NORTHERN ELECTRIC COMPANY, A DIVISION OF SUNBEAM CORPORATION,

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V.

ROSE HARRELL, ET AL,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Northern Electric Company respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Harrell, et al v. Northern Electric Company, a Division of Sunbeam Corporation*, No. 80-3781, 672 F.2d 444, *modified on rehearing*, 679 F.2d 31 (5th Cir. 1982).

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi has not been officially reported. The court's Judgment, together with its supplemental Statement of Facts, appear as Appendix A here-

to. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 672 F.2d 444 (5th Cir. 1982), and appears as Appendix B. The opinion of the court of appeals on rehearing is reported at 679 F.2d 31 (5th Cir. 1982), and appears as Appendix C.

JURISDICTION

Judgment of the court of appeals was entered on April 5, 1982. On timely Petition for Rehearing and Suggestion for Rehearing En Banc, the court entered an order modifying its original decision and denying in all other respects the Petition for Rehearing on June 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The statute involved is Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2 (1976). See Appendix D.

STATEMENT OF THE CASE

Plaintiff/Respondent Rose Harrell brought this action against Defendant/Petitioner Northern Electric Company (hereinafter sometimes referred to as "NECO") on April 21, 1978, alleging that Petitioner practiced discrimination against blacks in the hiring of clerical employees at its Hattiesburg, Mississippi facility in viola-

tion of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* At the close of the first stage of a bifurcated trial, judgment was rendered for NECO. Specifically, the district court ruled that NECO had not discriminated on a class-wide basis against blacks in filling clerical positions,[1] nor had it discriminatorily denied the Plaintiff, Rose Harrell, a clerical position because of her race.

Plaintiff appealed these adverse rulings, and in a decision rendered by a two-judge panel of the United States Court of Appeals for the Fifth Circuit, the court reversed the decision of the district court and rendered judgment for Plaintiff, finding unlawful discrimination against both the class and Plaintiff Harrell individually. Additionally, the court rendered judgment in favor of three (3) non-party witnesses who testified in support of Respondent's claim of class discrimination. In reversing the decision of the district court, the Fifth Circuit rejected a number of findings of fact by the district court which it found to be "clearly erroneous." With respect to the issue of discrimination, however, the court made its own "independent determination." Moreover, in arriving at its independent determination of discrimination, and contrary to the disparate treatment analysis followed by the district court, the court utilized the disparate impact analysis.

[1] The district court had previously certified the class as consisting of "all qualified Negro persons who have applied for employment in clerical positions with the defendant and who were not hired in a clerical position because of their race."

Subsequent to the Fifth Circuit's decision, this Court issued its decision in *Pullman-Standard v. Swint*, __ U.S. __, 102 S. Ct. 1781, 72 L.Ed. 2d 66 (1982), in which the Court held that the question of discriminatory intent is a factual matter subject to the clearly erroneous standard of Rule 52 of the Federal Rules of Civil Procedure. On rehearing, the Fifth Circuit acknowledged this Court's ruling in *Pullman-Standard v. Swint*, and summarily reaffirmed its prior judgment, stating:

> We reaffirm our conclusion that the trial judge erred in his assessment of the disparate impact issue. The error committed was essentially an error of law; the district court erred in its application of controlling legal principles to stipulated facts. The district court also erred in its evaluation of the stipulated facts as they related to the disparate impact issue. To the extent the assessment was factual it was clearly erroneous, Fed.R.Civ.P. 52(a). To the extent the assessment involved legal conclusions, it was legally incorrect.

679 F.2d at 31 (App. C-2).

Thus, the Fifth Circuit apparently concluded that the district court was clearly erroneous in its application of the facts to the disparate impact issue, despite the fact that the district court did not even consider that issue.[2]

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[2] On rehearing, the Fifth Circuit also concluded that its rendering of judgment in favor of three non-party witnesses was not consistent with the bifurcated status of the litigation, and vacated that portion of its prior opinion in which judgment was rendered in favor of those individuals.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S ANALYSIS OF THIS CASE UNDER THE DISPARATE IMPACT THEORY IS INCONSISTENT WITH SUPREME COURT PRECEDENT.

The Plaintiff below, Rose Harrell, alleged that NECO practiced discrimination against blacks in the hiring of clerical employees at its Hattiesburg, Mississippi facility. She attacked no specific employment device or requirement (i.e., educational standard, height or weight restrictions, aptitude test, etc.), but rather alleged that NECO has generally followed a practice of intentional discrimination toward blacks in hiring clericals. In evaluating Harrell's claim of class discrimination, the Fifth Circuit rejected NECO's contention that the only appropriate analysis was the disparate treatment theory and found NECO liable to the class based upon its finding of disparate impact. This ruling, it is submitted, is manifestly at odds with this Court's interpretation of the law.

The genesis of the disparate impact theory is *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), where the Court held that employment practices which are "fair in form, but discriminatory in operation" may constitute a violation of Title VII. Under such an analysis, in order to establish a *prima facie* case, a plaintiff must demonstrate the existence of employment practices that are "facially neutral in their treatment of different groups but that in

fact fall more harshly on one group than another." *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). If that burden is met, "the employer must then demonstrate that any given requirement has a manifest relationship to the employment in question in order to avoid a finding of discrimination." *Connecticut v. Teal*, __ U.S. __, 102 S. Ct. 2525, 73 L.Ed. 2d 30 (1982). Proof of discriminatory motive, under the disparate impact theory, is not required. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432. On the other hand, under the disparate treatment theory, the analysis is whether the employer has purposely treated some individuals less favorably than others because of their membership in a minority group. A fundamental difference in the elements of the two types of theories is that, under the discriminatory treatment theory, "proof of discriminatory motive is critical." *Teamsters v. United States*, 431 U.S. 324, 334 n.15 (1977).

The common thread running through the cases where the Court has applied the disparate impact theory is that a specific and identifiable procedure or mechanism, fair on its face, was being attacked by the plaintiff. Thus, in *Griggs v. Duke Power Co., supra*, the focus of the case was the defendant's requirement of a high school diploma which was found to have had a disproportionate impact on blacks. In *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the defendant's use of a written intelligence test in its hiring process was at issue. In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), a height and weight requirement was challenged. Likewise, in *New York City Transit Authority*

v. Beazer, 440 U.S. 568 (1979), the disparate impact theory was used to test the defendant's policy of refusing to employ persons in methadone drug treatment programs. And, more recently, in *Connecticut v. Teal, supra*, the impact on blacks of a written examination which was required for promotion was the subject of the analysis.

Conversely, in those cases which have concerned claims of alleged general unfavorable treatment toward a protected group rather than the use of an employment device that, though neutral on its face, impacts the protected group more harshly than the majority group, the Court has consistently applied the disparate treatment analysis. For example, in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), the government was attacking alleged subjective hiring procedures which had resulted in statistical disparities in hiring. 433 U.S. at 303. That case was treated by the plaintiff, and analyzed by the Court, under a "theory of discrimination [which] was simply that the [employer], in violation of Section 703 (a) of Title VII, regularly and purposefully treated negroes...less favorably than white persons." 433 U.S. at 306, n.12. Perhaps the Court's most clearly articulated view on this issue was in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), where the trial court analyzed the plaintiffs' allegation of discriminatory hiring practices under both the disparate treatment theory and the disparate impact theory. 438 U.S. at 569. The Court held that the only proper approach was the disparate treatment analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792

(1973), specifically noting that the case did not involve an employment test or other "particularized requirement". 438 U.S. at 575, n.7.

In the instant case, the critical distinctions made by this Court between the disparate impact theory and the disparate treatment theory were all but ignored by the Fifth Circuit. At no time was an identifiable policy, device, or requirement brought into issue by Respondent, much less shown to have had a disparate impact on blacks. The entire case was litigated on the basis of Respondent's allegation that "defendant has intentionally engaged in unlawful employment practices."[3] Yet, the Fifth Circuit reversed the district court's finding of no intentional discrimination and rendered judgment for the Plaintiff using a disparate impact model. Clearly, the decision of the Fifth Circuit in this regard is directly contrary to Supreme Court precedent.

II. THE FIFTH CIRCUIT'S ANALYSIS OF THIS CASE UNDER THE DISPARATE IMPACT THEORY IS CONTRARY TO DECISIONS IN OTHER CIRCUITS.

The decision of the Fifth Circuit also conflicts with decisions of the Third, Fourth, Eighth, Ninth, and Tenth Circuits. Each of those circuits has properly refused to apply the disparate impact theory to allegations of general discriminatory practices where no identifiable device or procedure has been alleged to have a disproportionate impact upon a minority group.

[3] Plaintiff's Complaint, at para. 10.

The Third Circuit, in *Croker v. Boeing Co.*, 662 F.2d 975 (3rd Cir. 1981), reviewed the plaintiff's claim that the defendant had engaged in a pattern or practice of race discrimination in hiring, placement and promotion, layoffs, job classifications, discipline and harrassment of employees. The plaintiff did not attack any specific procedure or requirement that, although facially neutral, had a disparate impact on blacks. The court recognized the differences between the impact and treatment theories and applied a disparate treatment analysis, holding that the statistical evidence presented by the plaintiff did not establish a pattern or practice of purposeful discrimination.

The Fourth Circuit, in *Pope v. City of Hickory, N.C.*, 679 F.2d 20 (4th Cir. 1982), rejected the plaintiffs attempt to have the statistical evidence analyzed under both the treatment and impact theories, stating:

> It is obvious that the plaintiff is not complaining in this case of some employment practice or procedure of the defendant, which, though neutral or fair on its face, has a discriminatory impact on blacks and thus does not fit within the model disparate impact claim.

Id. at 22.[4]

[4] This Fourth Circuit decision appears to conflict with a previous decision of that court holding that both the disparate impact and disparate treatment theories may be applied to the same set of facts as alternative theories. *See Wright v. National Archives & Records Service*, 609 F.2d 702, 711 (4th Cir. 1979).

The Eighth Circuit, in *Taylor v. Teletype Corporation*, 648 F.2d 1129 (8th Cir.), *cert. denied*, 102 S. Ct. 515 (1981), was presented with statistical evidence concerning alleged disparities in the demotion of blacks. Rejecting an argument by the defendant that the disparate impact analysis had been applied, the court held that the district court had properly viewed the claims as alleging disparate treatment, explaining:

> A Griggs-type case challenges facially neutral standards that affect employees in a significantly discriminatory pattern. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 329, 53 L.Ed. 2d 786, 97 S. Ct. 2720, 2726 (1977) (height and weight requirements); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425, 45 L.Ed. 2d 280, 95 S. Ct. 2362, 2375 (1975) (standardized tests); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971) (high school diploma and standardized tests). Here, plaintiffs do not challenge objective criteria; rather, they allege improper use of subjective procedures for demotions.

Id. at 1132-33 n.6.

In *Heagney v. University of Washington*, 642 F.2d 1157 (9th Cir. 1981), the plaintiff contended that classifying certain employees as exempt from state personnel law was a neutral employment practice that had a disproportionate impact on the salaries of female employees. In meeting this argument, the Ninth Circuit first gave its interpretation of the decisions in *Teamsters*, *Griggs*, and *Dothard v. Rawlinson:*

> In a disparate impact case, a Plaintiff must show that *some facially neutral employment practice* has a *substantially disproportionate impact* upon a group protected by Title VII. Examples of such outwardly neutral employment practices include height and weight requirements, or certain types of employment tests adversely affecting those of certain cultural backgrounds [citations omitted].

Id. at 1163 (emphasis added).

The court then held that the case was inappropriate for analysis under a disparate impact theory:

> It is apparent, however, that the creation of jobs that are exempt from the Washington personnel law cannot be equated with such well-defined objective employment practices as personnel tests or minimal physical requirements....The gravamen of Heagney's complaint is that the lack of well-defined employment criteria allowed a pattern or practice of discrimination to exist. We therefore conclude that "impact" analysis is inappropriate and that Heagney was required to prove disparate treatment.

Id. at 1163.

Recently, in *Mortensen v. Callaway*, 672 F.2d 822 (10th Cir. 1982), the Tenth Circuit rejected the notion that the disparate impact theory could be used where there were no allegations of a facially neutral practice that had a disproportionate impact upon a minority group. The plaintiff in that case sought individual relief under both the dis-

parate impact and disparate treatment theories, and, on appeal, claimed that she had proven a *prima facie* case of disparate impact. The court disagreed, finding that although the plaintiff had introduced statistical evidence showing a lack of female supervisors, "she [had] not pointed to any employment practice that, neutral on its face, [had] caused women not to be promoted to supervisory positions." *Id.* at 824.

Thus, the Fifth Circuit's decision in the instant case is in direct conflict with decisions of the Third, Fourth, Eighth, Ninth, and Tenth Circuits. Each of these circuits has expressly limited the applicability of a disparate impact theory to cases where specific employment requirements, although facially neutral, have a disproportionate impact upon a minority group. This split of authority among the circuit courts creates a pressing need for the Court to provide guidance for the uniform adjudication of cases in this significant area of the law.

III. *THE FIFTH CIRCUIT'S ANALYSIS OF THIS CASE UNDER THE DISPARATE IMPACT THEORY CONFLICTS WITH ITS OWN PRECEDENT*

Ironically, not only does the Fifth Circuit's decision conflict with Supreme Court precedent and the rulings of other circuit courts, it also conflicts with its own recent precedent.

In *Pouncy v. Prudential Insurance Company of America*, 668 F.2d 795 (5th Cir. 1982), decided prior to the court's decision in this case, a different panel of the Fifth Circuit discussed at length the appropriate use of the disparate impact and disparate treatment models. The court expressly stated that the disparate impact model was appropriate only where it is alleged that an identifiable employment policy, although neutral in form, has a significant impact on a protected group. *Id.* at 799-80. In such cases, a plaintiff need only show that a facially neutral practice produces a significant adverse impact; the employer's intent to discriminate is not at issue. *Id.* at 800. The court emphasized, however, that the disparate impact analysis is *not appropriate* where a plaintiff is attempting to establish through the use of statistics that intentional discrimination has been the motivating factor in a number of specific employment decisions:

> *The discriminatory impact model of proof in an employment discrimination case is not, however, the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices.* Nor may just any employment practice be challenged under this model simply because an uneven racial balance exists in an employer's workforce.

Id. at 800 (emphasis added).

The analysis in *Pouncy* was subsequently reaffirmed by still another panel of the Fifth Circuit in *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982).

There, the court held:

> Travenol's interviewing cannot be viewed as a neutral practice with a disparate effect thus subject to *Griggs v. Duke Power Co., supra*, as Payne argues. Hiring processes that rely heavily on subjective interviewing provide an opportunity for the intentional discrimination that lies at the heart of a disparate treatment case. Payne does not urge that Travenol has violated Title VII by seeking alert, capable operative workers; rather she charges that Travenol masked its intentional discrimination by purporting to screen applicants for these qualities while actually discriminating on the basis of race. Subjective discrimination in interviewing or in similar evaluation processes has repeatedly been held to fall into the disparate treatment branch of Title VII law. [Citations omitted.]

Id. at 817.

Clearly, the Fifth Circuit's decision in the instant case is irreconcilable with the decisions in *Pouncy* and *Payne*.[5] Had the principles enunciated in *Pouncy* and *Payne* been applied in the instant case, there can be no doubt but that the findings and conclusions of the trial court would have been left undisturbed. Moreover, because of the contradictory decisions by the Fifth Circuit, the

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[5] In *Johnson v. Uncle Ben's Inc.*, 657 F.2d 750 (5th Cir. 1981), petition for cert. filed __ U.S.L.W. __ (U.S. Apr. 30, 1982) (No. 81-2026), yet another panel of the Fifth Circuit, contrary to *Pouncy* and *Payne*, followed the same rationale as did the panel in the instant case. The petition in *Uncle Ben's* raises similar issues as does the instant petition.

district courts and litigants in that circuit have no way of knowing what standards to apply in Title VII litigation.[6]

IV. *THE FIFTH CIRCUIT'S ANALYSIS IMPROPERLY MINIMIZED THE PLAINTIFF'S BURDEN OF PROOF AND IMPROPERLY INCREASED THE DEFENDANT'S BURDEN OF REBUTTAL.*

In applying the disparate impact model rather than the disparate treatment model, the Fifth Circuit effectively minimized the Plaintiff's burden of proof, and increased the Defendant's burden of rebuttal.

A. *Plaintiff's Burden of Proof*

While statistics may be used in both treatment and impact cases, a much greater burden must be met to prove class-wide disparate treatment because the Plaintiff must prove that *intentional* racial discrimination is "the company's standard operating procedure—the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336. To meet this burden, *gross statistical disparities* must be shown. *Teamsters*, 431 U.S. at 335 n.15. The quantum of disparity required to show intentional discrimination must be significantly greater than the disparity caused by a neutral policy because, with a finding of class-wide disparate treatment, the court is necessarily making a judicial determination that all employment decisions of

[6] The Fifth Circuit declined Petitioner's application for an *en banc* rehearing in the present case, which would have enabled the court to reconcile these conflicting authorities.

the type in question were racially motivated without analyzing each individual decision.

In analyzing Plaintiff's evidence using a "disparate impact assessment", 672 F.2d at 446 (App. B-5), the Fifth Circuit concluded that although "[a]ppellant's statistical basis is not perfect...the disparity between the percentages of blacks applying and those hired...is sufficient to raise a *prima facie* case of class discrimination." 672 F.2d at 447 (App. B-7). On its face, however, the decision below cannot sustain a finding that "gross statistical disparity" was established by Respondent. Although the court discussed various types of statistical evidence presented by Respondent, the gravamen of the court's review of the district court's finding of no class-wide discrimination rested upon whether four (4) offers of employment were made. Under the court's analysis, if the four offers *were not made*, there existed a *substantial statistical disparity* requiring a finding of class-wide discrimination; if the four (4) offers *were made*, there was *no class-wide discrimination*.[7]

The court then found that while the four offers may have been made, there was insufficient evidence for the district court to conclude that the offers were for clerical

[7] As the court stated in its opinion, "...If all four of the purported 'offerees' are included in the calculations, the statistical disparity only slightly exceeds two standard deviations. If the 'offerees' are included and the transferees are excluded, the disparity falls below two standard deviations, belying a *prima facie* case of discrimination." 672 F.2d at 447 (App. B-7, 8).

positions.[8] Therefore, according to the Fifth Circuit, Plaintiff had proven class discrimination under the disparate impact model. In short, by using the disparate impact model, the court determined on the strength of four employment decisions that all decisions regarding the hiring of clericals were discriminatory.

B. *Defendant's Burden of Rebuttal*

Conversely, while the Fifth Circuit's application of the disparate impact theory effectively minimized Plaintiff's burden of proof by relieving Plaintiff of the burden of showing a gross statistical disparity, Defendant's burden of rebuttal became virtually impossible to meet.

Under the disparate impact theory, once a plaintiff has shown that a facially neutral employment practice has a significant discriminatory impact upon a minority group, the burden then shifts to the defendant to demonstrate that the "given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination. *Griggs, supra* at 432. Obviously, an employer's burden to demonstrate that a given "requirement" has a "manifest relationship to the employment in question" is predicated upon the existence of a "requirement." If there is no identifiable practice which is being attacked, how can the employer produce "manifest relationship" evidence? In short, a defendant *cannot* rebut a *prima*

[8] The court rejected the credibility findings of the district court on this issue as clearly erroneous. This makes the Fifth Circuit's statistical analysis all the more tenuous.

facie case of disparate impact where no specific practice or procedure has been identified by the plaintiff. Thus, the application of the disparate impact theory to a case such as this where no identifiable practice is being attacked is both improper from a conceptual standpoint and impossible from an evidentiary standpoint.[9]

V. *THE FIFTH CIRCUIT FAILED TO PROPERLY APPLY THE CLEARLY ERRONEOUS STANDARD TO THE DISTRICT COURT'S FINDING OF NO DISCRIMINATION, AS WELL AS TO ITS FINDINGS OF SUBSIDIARY FACTS.*

The Fifth Circuit's reversal of the district court's finding of no discrimination was ultimately based upon the Fifth Circuit's conclusion with regard to job offers to four (4) black applicants for clerical positions. Applying the "clearly erroneous" standard, the court rejected the district court's finding that the four clerical job offers were made. Then, making an "independent determination of the ultimate issue of discrimination," 672 F.2d at 446 (App. B-3), the court concluded that Respondent had made a *prima facie* case of class-wide racial discrimination. On rehearing, when faced with this Court's recently announced decision in *Pullman-Standard v. Swint, supra*, the Fifth Circuit reaffirmed its finding of class discrimination, stating in the decision on rehearing that it had applied the

[9] The Fifth Circuit in *Pouncy* recognized this, stating: "Identification by the aggrieved party of a specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy." 668 F.2d at 796.

"clearly erroneous" standard of review mandated by *Swint*.

Where, as here, an appellate court is reviewing the findings of a district court sitting without a jury, the determination for the appellate court under Rule 52(a) is not whether it would have made the same finding as did the trial court, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake had been committed." *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123; *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). It is respectfully submitted that the Fifth Circuit overstepped the narrow limits of the clearly erroneous standard in rejecting the district court's finding with respect to the four (4) clerical job offers. As to each offer, business records of both the company and the Mississippi State Employment Service, coupled with testimony concerning standard company practice, more than sufficiently support the district court's finding that the offers were made.[10]

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[10] The Company's personnel director testified that it was then and had been the regular business practice of NECO to record rejected job offers on the applications on the respective applicants. On the application of each of the four applicants in question, there were notations indicating that job offers had been made. (The evidence reflected that clerical offers which were declined were made to nine (9) whites as well.)

Janice Wilson (Richards) was referred to NECO by a private employment agency for consideration for a clerical position and she indicated on her application form that her first and second choices were clerical positions. A notation on her application form states "Offered Job—Has Accepted Employment On Other Job."

Deborah McGee was referred to NECO by the Mississippi State Employment Services (MSES) for a clerical position and likewise indicated on her application form that both her first and second choices were clerical positions. A notation on her application form states:

Even assuming *arguendo* that the Fifth Circuit properly found the district court to be clearly erroneous in its finding that the four (4) clerical offers were made, the Fifth Circuit's conclusion that the district court's finding of no class-wide discrimination was clearly erroneous simply belies the facts of this case. During the time period in issue, over 500 individuals made applications for clerical positions. The Fifth Circuit, after reviewing the district court's findings and concluding that the district court was clearly erroneous, made its own "independent determination" that, excluding the four offers, a statistical showing of class discrimination had been established. Without any further analysis, the court on rehearing subsequently held that its finding of class discrimination satisfied the clearly erroneous standard.

Defendant submits that the Fifth Circuit did nothing more than give lip service to this Court's decision in *Pullman-Standard v. Swint, supra.* The Fifth Circuit's

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(Footnote 10 continued)
"9/19/77 part-time personnel, never showed up for work."

Allen Thompkins also was referred to Defendant by MSES for a clerical position, and he indicated on his application form that his first and second choices were clerical positions. A notation of his application form states: "Called 8/23/77 not interested now, attending school."

Carolyn Reed was the fourth applicant whose application form indicated that clerical employment was offered. She was also referred by MSES for a clerical job. Her application form indicates that she was questioned about and declined interest in a typing job.

In each of these cases, records were kept in the ordinary course of business reflecting employment was offered to the applicant. Even though the appellate court may have come to a different conclusion, it cannot be said that the district court's findings that clerical positions were offered to these individuals were without support in the record.

"clearly erroneous" finding was based solely on its exclusion of offers of clerical employment to four (4) black applicants from the applicant flow analysis.[11] It is inconceivable that the district court was clearly erroneous in finding that there was no evidence of gross statistical exclusion of blacks where the Fifth Circuit's own applicant flow analysis of NECO's clerical hiring practices, involving over 500 offers and rejections, rested upon the inclusion or exclusion of four (4) offers of employment. Clearly, although the Fifth Circuit may have come to a different conclusion had it been sitting as the trial court, it cannot be said that the district court's finding of no discrimination was clearly erroneous.

It is also significant that, even excluding the four clerical offers, the disparity between the white direct hire ratio and the black direct hire ratio is 2.56 standard deviations,[12] falling well below three standard deviations. This

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[11] The Fifth Circuit also questioned the exclusion of transfers in the applicant flow analysis relied upon by the district court. However, the court did not make this a basis for its conclusion that the district court was clearly erroneous, stating that under its (the Fifth Circuit's) analysis, it did not matter whether transfers were considered or not. See 672 F.2d at 447 (App. B-7).

[12] Standard deviations may be calculated as follows:

$$\frac{np - x - .5}{\sqrt{npq}}$$

Applying the direct hire data, n = the total number of both races actually hired (137), p = the proportion of blacks in the applicant pool (80/582 or .137), q = the proportion of whites in the applicant pool (502/582 or .863), np = the expected number of black hires (137 x .137 or 18.8), and x = the actual number of blacks selected (8). The .5 in the

Court has previously held that a challenged practice may become suspect if the difference between the expected value and the observed number is greater than "*two or three* standard deviations." *Castaneda v. Partida*, 430 U.S. 482 (1977), *Hazelwood School District v. United States*, 433 U.S. 299 (1977). Thus, the 2.56 standard deviations found in this case, even when *excluding offerees*, is well within the limits of the "two or three" test recognized by this Court. Presumably, this Court did not set a "brite line" in *Castaneda* because of the inherent impreciseness of utilizing mathematical formulas to create inferences of discrimination, but rather suggested a range within which trial courts could evaluate statistical analyses in the context of the particular facts of each case. Here, the 2.56 standard deviations fall well within the range discussed in *Castaneda*. Under such circumstances, the Fifth Circuit overstepped its appellate role by concluding that, as a matter of law, there was no basis for the district court's finding that Respondent had failed to establish a *prima facie* case.

VI. *EVEN IF THE DISPARATE IMPACT THEORY IS APPROPRIATE, THE FIFTH CIRCUIT IMPROPERLY APPLIED IT IN THIS CASE.*

(Footnote 12 continued)
formula is a correction factor used in pools of this size and nature. (See App. B-6). The standard deviation computes out as follows:

$$\frac{18.8 - 8 - .5}{\sqrt{18.8(.863)}} = \frac{10.3}{\sqrt{16.2}} = 2.56$$

A. Petitioner had no notice that this was a disparate impact case.

The pertinent part of Plaintiff's Complaint, as amended, alleges that "defendant has intentionally engaged in unlawful employment practices at its Hattiesburg facility in violation of Section 703(a) of Title VII." The Plaintiff having alleged intentional discrimination, and not having alleged that any practice or policy had a disparate impact on blacks, this case was tried as a disparate treatment case. Accordingly, the district court's decision was limited to consideration of the facts under the disparate treatment theory. Nonetheless, the Fifth Circuit reviewed the case using the disparate impact analysis.[13]

While the Federal Rules of Civil Procedure call for liberal treatment of pleadings, a complaint is nevertheless required to "adequately set forth a claim and give the Respondents fair notice of its basis." *Conley v. Gibson*, 355 U.S. 41, 48 (1957). NECO was totally unapprised in this case that it was being called into court to defend a disparate impact case. The Complaint contained no reference whatsoever to any policy which allegedly had a disproportionate impact on blacks, but on the contrary, affirmatively alleged intentional discrimination. This failure

[13] The Fifth Circuit reasoned that it was not improper to consider the disparate impact theory because both parties had introduced statistical evidence which is relevant to disparate impact and disparate treatment consideration. Citing Rule 15(b) of the Federal Rules of Civil Procedure, the court implicated that the issue of disparate impact had been tried by implied consent of NECO. See 672 F.2d 446 n.3 (App. B-4).

to give NECO notice regarding a disparate impact claim was unavoidably prejudicial to NECO inasmuch as "the factual issues, and therefore the character of the evidence presented, differ when the Plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252 n.5 (1981).

A similar question of adequate notice was raised in *Ste. Marie v. Eastern Railroad Association*, 650 F.2d 395 (2d Cir. 1981), where the plaintiff, having alleged that the employer maintained practices that discriminated against female employees, argued that the evidence presented made out a *prima facie* case under both the disparate impact and the disparate treatment theories. The court rejected this argument, stating:

> We reject this belated attempt to introduce a new theory of liability. As the district court's liability opinion made clear, ... the case was tried and decided below, with the consent of both parties, on a theory of disparate treatment. To hold the Defendants to the more stringent burden applicable in a disparate impact case at this date would be manifestly unfair.

650 F.2d at 399. Likewise, in the instant case, even assuming the disparate impact analysis might have been applicable in this case, it should not have been applied for the first time by the appellate court after the case had been pled, tried, and decided under the disparate treatment theory.

B. *The Fifth Circuit incorrectly made a determination of discrimination based upon both facts and theories which were not considered by the district court.*

In reviewing the district court's disposition of this case, the Fifth Circuit overturned as "clearly erroneous" important findings of fact by the district court that offers of clerical employment had been made to four (4) black applicants. The Fifth Circuit also concluded that the disparate impact theory, a theory which had not been considered by the district court, could form the basis of recovery for Plaintiff.[14] Then, after reversing these critical findings of fact and concluding that an alternative theory was applicable to these new facts, the Fifth Circuit proceeded to apply these new facts to the theory of law not considered by the district court.

As a general proposition, where an appellate court determines that the lower court has applied an incorrect legal standard, the correct procedure is to remand the case back to the trial court with the direction that the matter be reconsidered in light of the proper test. *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331-332 (1974); *Malat v. Riddell*,

[14] On rehearing, the Fifth Circuit stated that the district court had erred in its evaluation of the stipulated facts as they related to the disparate impact issue. It is difficult to see how this is possible in view of the fact that the district court did not even consider the disparate impact issue. The district court, like Petitioner, viewed the case as a disparate treatment case.

383 U.S. 569, 570 (1966).[15] In this case, remand was all the more appropriate because, not only was an improper standard (according to the Fifth Circuit) used by the district court, but key subsidiary facts to which the "correct" standard was to be applied had also been changed by the appellate court. By failing to remand the case, and instead applying a different legal standard to different facts, the Fifth Circuit, in effect, assumed the role of a trial court. Petitioner submits that even if the rulings of the Fifth Circuit on the underlying issues are correct, the Fifth Circuit should have remanded the case to the trial court for further consideration in light of the appellate court's rulings.

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[15] In *Trust Co. of Georgia v. Ross*, 392 F.2d 694, 696 (5th Cir.), *cert. denied*, 393 U.S. 830 (1968), the Fifth Circuit itself has previously stated:

> Ordinarily, in any non-jury trial where an improper test has been applied, the accepted procedure is to remand to the trial court with the direction that the matter be reconsidered in light of the proper test.

CONCLUSION

For the foregoing reasons, the petitioner for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

I, Walter W. Christy, hereby certify that I have on this ____ day of September, 1982 caused three copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to be served by United States mail, certified, return receipt requested, upon the following counsel of record for Respondent:

Ms. Martha Bergmark
Ms. Alison Steiner
Andalman, Adelman & Steiner, P.A.
Post Office Box 368
Hattiesburg, Mississippi 39401

APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

CIVIL ACTION NO. H78-0065 (C)

ROSE HARRELL, ET AL PLAINTIFFS

V.

NORTHERN ELECTRIC COMPANY, DEFENDANT
DIVISION OF SUNBEAM CORPORATION

JUDGMENT

This is a Title VII suit. The plaintiff instituted this suit on authority of a ninety day letter from EEOC indicating the existence of probable cause. The plaintiff is a female black whose ambition exceeds her grasp. She was in the employ of the defendant in the production department, but desired a promotion to the clerical department, and quit when it was not granted. This is this law suit in a nut shell.

Plaintiffs' Exhibit 25 will be entered into evidence and so marked by the Court.

Plaintiffs' motion to exclude the evidence and enter a judgment for the plaintiffs is overruled. Plaintiffs' motion for allowance of a reasonable attorney's fee is denied. Defendant's motion for an allowance of a reasonable attorney's fee is likewise denied.

This Court has full jurisdiction of the parties and the subject matter under Title VII of the United States Code. Plaintiffs have exhausted all of their administrative remedies and have timely filed this suit in this Court as authorized by EEOC letter of authorization.

Plaintiff (Rose Harrell) is a black female who contends here that she has been discriminated against by the defendant on her applications for a clerical job. Plaintiff brought this suit on her own behalf and on behalf of all other blacks who have been discriminated against because of their race by the defendant at its Hattiesburg, Mississippi facility. This litigation has been vigorously prosecuted and vigorously defended at all stages of this case by able counsel on both sides. Actually, the only single question before this Court is to determine on a fair trial whether or not Rose Harrell and her class, as fixed by this Court, have been unlawfully and improperly discriminated against solely because of their race at the Hattiesburg, Mississippi facility. No occasion exists for any inflammatory action by counsel on either side in this very simplified controversy.

Plaintiff was employed by the defendant in a production position but she desired employment in a clerical position and quit her job. Plaintiff repeatedly sought a clerical position with the defendant but was in each instance properly denied such transfer. The plaintiff had a poor work record with the defendant and never had any experience or work experience in a clerical position. Plaintiff never

showed this Court by the greater weight of the more convincing evidence that defendant had any clerical position open and available to anyone holding the qualification and experience of the plaintiff. Plaintiff's proof in this case that defendant nevertheless continued to employ people, and more particularly white people for clerical positions at the time she sought and was denied employment, simply fails to show this Court that plaintiff was not hired just because she was black. Plaintiff has not shown this Court by the requisite evidence as to the experience and qualifications of those persons hired by the defendant in the clerical department. There is no testimony anywhere to be found in this record that this defendant continued to accept applications from and to employ persons in its clerical department who held merely the qualifications and experience and work record of plaintiff.[1]

The plaintiff has simply failed to show this Court by a preponderance of the evidence that she has been discriminated against by the defendant at the Hattiesburg facility solely and alone because she is black and for no other reason. That duty and that obligation was imposed by law upon the plaintiff to afford her the rights of a liti-

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[1] *McDonnell Douglas Corporation v. Percy Green*, 411 U.S. 792, 93 S.Ct. 1817, 1824 the Court held: "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

gant who has established such wrong in a prima facie case to the necessary extent to entitle the plaintiff to make out a prima facie case and obligate the defendant to show otherwise. The plaintiff simply has not made out such a prima facie case in this Court; and this Court finds as a fact and adjudges as a matter of law that the plaintiff has not been discriminated against by the defendant solely because she is black.

This Court heard six witnesses for the plaintiff and members of her class, and six witnesses for the defendant, including an expert witness on each side of the case. The defendant in this case was a new industry in the area which was brought in to aid and assist the economy under the state policy of balancing agriculture with industry. It was important to this new industry that it employ competent and qualified people in its specialized field. Actually, it sought the aid and assistance of the Mississippi State Employment Commission to send it competent and qualified people whom the defendant carefully screened and employed when it determined by proper investigation that such persons were competent and qualified to hold jobs with the defendant. Race did not and never has been any one of this criteria for holding a job; and this agency which produces and sells to the general public an article which is useful and helpful to any person in the home regardless of his race and certainly has no predisposition to any improper use of race in its hiring processes. Plaintiff's race certainly had nothing to do with the denial of her application to the job of PBX operator. Plaintiff did not

even attempt to show that a white person hired for the position had any qualification near those possessed by the plaintiff. Likewise, Susan Bell Williams was not a similarly situated white who was treated better than Rose Harrell since Susan Bell Williams' work record was not marred by disciplinary warnings, poor production, absenteeism, tardiness, etc., and since Susan Bell Williams, unlike plaintiff, had the ability to operate a calculator, a skill relevant to the work of a traffic clerk. Plaintiff claimed that she was discriminatorily denied transfer into two other clerical positions, but plaintiff was unable to state what those positions were, who received the positions, or what experience, knowledge or skill the two alleged white individuals who received these alleged clerical openings possessed. Defendant demonstrated that white employees, Joan Graves and Vickie Graham, both of whom sought transfers from a production position to a clerical position, and both of whom has similar experience, skills and ability to the plaintiffs, were denied transfers. Plaintiff has thus failed to show by a preponderance of the evidence that defendant's reason for not placing her in a clerical position, either initially or by a subsequent transfer, was a pretext to cover up racial discrimination. Plaintiff next undertook to prove a prima facie case of class discrimination by the use of statistics. The defendant presented testimony of a learned and experienced statistician (Dr. Arnold Levine) who is the head of this department at Tulane University.[2]

[2] At the outset, it must be understood that a trier of facts need not accept the opinion testimony of expert witnesses, even though uncontradicted. *Boon Enterprises, Inc. v. Carstairs*, (5CA) 312 F.2d 333; *Alfred Griffin v. Missouri Pacific Railroad Company*, (5CA) 413 F.2d 9, 13.

Plaintiff's Exhibit 24 is incomplete and misleading and does not constitute any valid statistical evidence of significant disparity. The testimony of Rose Harrell, Betty Dagons and Patricia Pittman failed to show that there were clerical openings at the time they applied for work with the defendant. The evidence in any event did not show that there were any clerical openings at the time plaintiff and Dagons applied, and neither were qualified to fill the openings since they did not possess the requisite experience to fill those initial openings. There was no evidence of any discrimination in defendant's transfer policies (excluding for analytical purposes, the work record at defendant's plant of Harrell, Dagons and Pittman) that similarly situated or lessor qualified white received clerical positions ahead of Harrell, Dagons and Pittman. Neither plaintiff nor Dagons nor Pittman were qualified to transfer from a production position to a clerical position since their work records at defendant's plant was poor. Dr. Levine credibly showed that plaintiff's expert (Dr. Graber) impermissibly mixed different population pools in lumping into the number of applicants the transfers from Laurel and Waynesboro to Hattiesburg, and in lumping into the number of hires these transfers and the transfers from production positions into clerical positions. Dr. Levine contended that it was impermissible to mix transfers from production to clerical with applicants who had never worked for the defendant since different criteria governed their selection. That is, although one's ability, skills, education and experience were relevant, the work record at defendant's plant of the employees seeking transfer from pro-

duction to clerical dispositively could result in the rejection of a transfer being sought, whereas applicants who had never worked for defendant were chosen or rejected for clerical openings based only upon abilities, skills, education and experience acquired elsewhere.

Dr. Levine testified and his exhibits showed that there was no statistical evidence of disparity in defendant's hiring policies. Defendant's Exhibit 13, which analyzes and stipulates the number of applicants and correct number of hires was totaled in black, indicates no statistical disparity exists. Dr. Levine's conclusion that twelve blacks were either hired for clerical positions, or offered clerical positions, was supported by credible and convincing evidence. Both plaintiff and defendant stated that eight blacks were actually hired into clerical positions. The record irrefragably shows that it was defendant's regular business practice to record evidence of job offers on individual's application form. Defendant presented the application form of four blacks and nine whites, whereupon it was shown that clerical offers had been made. Plaintiff's attempt to discredit the fact that job offers had been made clearly failed. Janice Wilson (Richards) and Carolyn Reed were interested witnesses, that is, they were offered jobs. They thereby eliminated themselves from any potential recovery available to class members should this Court find defendant guilty of discrimination. Wilson admitted that the indication that she had accepted other employment on her application form was correct, if the notation was made after she had been referred by Jobs Unlimited, her employ-

ment agent, for work at Rhodes Furniture.

This Court has heard testimony in this case extensively from twelve witnesses and finds as a fact and adjudicates as a matter of law that plaintiff and her class of witnesses in this case have failed to show the Court by a preponderance of the evidence that plaintiff and members of her class as black citizens have been discriminated against by the defendant because of their race at the Hattiesburg facility; and that the plaintiff has thus failed to show this Court by a preponderance of the evidence that they have thus established a prima facie case on this record to show any illegal racial discrimination in their hiring processes down here at Hattiesburg.[3]

Accordingly, the motion of the defendant to dismiss plaintiff's individual action and her class action for failure to establish a prima facie case of discrimination will be and is sustained.

The defendant is invited by the Court to present, if desired, a clear and concise statement of facts to accompany this judgment and be made a part hereof by adoption if and when executed by the Court. Plaintiff and members of the class are assessed with all costs of this suit to be taxed by the Clerk of this Court and for all of which proper process may issue.

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[3] "Tis not the many oaths that make the truth,

But the plain single vow that is vow'd true."

ORDERED AND ADJUDGED, this August 25, A.D., 1980.

/S/ HAROLD COX
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

ROSE HARRELL,

Plaintiff,

versus

CIVIL ACTION

NORTHERN ELECTRIC COMPANY A DIVISION OF SUNBEAM CORPORATION,

NO. H-78-0065 (C)

Defendant.

STATEMENT OF FACTS

The Court herewith adopts the following Statement of Facts in conjunction with the Judgment rendered on August 25, 1980.

1.

Plaintiff Rose Harrell contended that she was discriminatorily denied a clerical position at Defendant Northern Electric Company's Hattiesburg facility because of her race. She similarly claimed that Defendant discriminated against the class certified in this matter by denying them clerical positions at the Defendant's facility because of their race. The facts do not support Plaintiff's contentions either as to her individual claim or as to her claims on behalf of the class.

2.

Plaintiff contended that she was discriminated

against in not being hired into a clerical position when she initially applied for work at the Defendant's facility. The undisputed facts reflect that in filling the initial clerical positions at its facility, Defendant sought and filled such positions with individuals who had prior clerical experience. Plaintiff had no prior clerical experience. She was not discriminated against with respect to initial hire.

3.

Plaintiff contended that she was discriminatorily denied a transfer to a clerical position after she was hired as a production worker. This contention was refuted by Plaintiff herself on cross-examination wherein she testified that the only discrimination of which she was complaining occurred in September, 1974, around the time of her initial hire. Nonetheless, the facts do not support a finding that Plaintiff was discriminatorily denied a transfer to a clerical position inasmuch as Plaintiff was not qualified for such a transfer given her poor work record. The undisputed facts established that a poor work record essentially disqualified a person from transferring to a position of greater authority which is what a clerical position would represent.

4.

There was no evidence to reflect that there was any intentional discrimination directed against Plaintiff by Defendant.

5.

Plaintiff did not establish that she was treated any differently than would a similarly situated white person have been treated. To the contrary, the undisputed facts disclose that at least two white production employees were denied transfers to clerical positions in the same way as was Plaintiff.

6.

Plaintiff did not present any credible statistical analyses in attempting to prove discrimination on behalf of the class. To the contrary, the statistical analyses presented by Plaintiff's expert witness, Dr. Robert Graber, were misleading, illogical, and based upon incorrect information. Dr. Graber's analysis, as reflected in Plaintiff's Exhibit 23, incorrectly includes transfers from other Company facilities and transfers from production to clerical positions. The analysis further fails to include persons offered clerical positions who turned down such positions, both blacks and whites.

7.

The Court also rejects Dr. Graber's analysis as reflected in Plaintiff's Exhibit 24. The data used by Dr. Graber is faulty in that it does not accurately reflect the availability of clerical applicants with the Mississippi State Employment Service. Further, as Dr. Graber admit-

ted, the more appropriate benchmark would be based upon the percentage of blacks that actually applied for work at Defendant's facility.

8.

The Court accepts the testimony of Defendant's expert, Dr. Arnold Levine, as reflected in Defendant's Exhibit 13. This analysis correctly excludes transfers from other facilities and from the production department and correctly includes persons offered jobs as clericals. Plaintiff attempted to establish that two of the four blacks that Defendant's evidence shows were offered jobs, were not actually offered such jobs. The undisputed evidence reflected that the Defendant recorded job offers on the job applications. This was established in the case of the four blacks and the nine whites. The Court finds that Ms. Wilson and Ms. Reed were not credible witnesses and that they did not rebut the evidence that job offers were made to them.

9.

The Court also accepts the testimony of Dr. Levine as reflected in Defendant's Exhibit 15. This exhibit took into account the availability of blacks and whites for jobs when they became open, as well as relevant education and work experience. The Court is satisfied that the analysis fairly and accurately reflects this information and correctly concludes that there is no evidence of statistical dispari-

ty with respect to Defendant's hiring of blacks for clerical positions.

10.

Plaintiff offered no statistical evidence with respect to transfers to clerical positions. Dr. Levine's analysis, as reflected in Defendant s Exhibit 14, indicates that there is no statistical disparity between the expected number of blacks that transferred and the actual number. The Court accepts such analysis and finds no statistical basis to conclude that race was a factor in Defendant's transfer policy from production jobs to clerical jobs.

11.

The Court finds that the other evidence offered by Plaintiff in support of her claim of class discrimination, i.e., the testimony of the witnesses and various documentary evidence, likewise does not establish any discrimination on the part of Defendant against blacks as a class in filling clerical positions.

12.

The evidence did not establish that race played any part in Defendant's failure to place Plaintiff Rose Harrell in a clerical position. Similarly, the evidence did not establish that race played any part in Defendant's placement of blacks in clerical positions.

Jackson, Mississippi, this 8 day of September, 1980.

/S/ HAROLD COX
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

Rose HARRELL, on behalf of herself and all persons similarly situated, Plaintiff-Appellant,

v.

NORTHERN ELECTRIC COMPANY, Division of Sunbeam Corporation, Defendant-Appellee

No. 80-3781

United States Court of Appeals, Fifth Circuit

April 5, 1982.

Appeal from the United States District Court for the Southern District of Mississippi.

Before POLITZ and RANDALL, Circuit Judges*.

POLITZ, Circuit Judge:

Rose Harrell invoked the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, against Northern Electric Company, a Division of Sunbeam Corporation (NECO), contending that NECO practiced discrimination against blacks in the hiring of

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* Jack M. Gordon, District Judge of the Eastern District of Louisiana, sitting by designation, was a member of the panel which heard oral argument. Because of his death on March 4, 1982, this case is being decided by a quorum, 28 U.S.C. § 46(d).

clerical employees at its Hattiesburg, Mississippi facility. On Harrell's motion, the complaint was certified as a class action under Rule 23(a)(b)(2) of the Federal Rules of Civil Procedure. The court bifurcated the trial, and, at the close of evidence on the liability issue granted NECO's Fed.R. Civ.P. 41(b) motion to dismiss both the individual and class actions. We reverse and render on liability and remand with instructions for trial on the relief phase.

NECO manufactures small electrical appliances at several plants in Mississippi. Hiring for its Hattiesburg facility began in July 1974; operations commenced a few months later. The pertinent work force numbers about 550, ten percent is classified as clerical.

Harrell applied for employment at NECO's Hattiesburg plant in August of 1974, noting "office" as her first job preference and "machine" as her second choice. She was hired in September as a cord assembler on the production line. A few weeks later she was interviewed for a clerical job but was not reassigned.

NECO furloughed Harrell in January of 1975 and recalled her the following month. She quit shortly thereafter to seek clerical employment elsewhere and filed a complaint against NECO with the Equal Employment Opportunity Commission. Harrell's termination rating qualified her for re-employment and she was rehired as a production line worker in October of 1977.

After receipt of a Right to Sue Letter from the EEOC, Harrell filed suit maintaining that NECO assigned blacks exclusively to production line work, refusing to hire blacks for the higher clerical positions for which they were qualified. Evidence adduced at trial was both specific, relating to treatment accorded Harrell and other applicants, and general, involving a consideration of statistical data.

Threshold Considerations

[1,2] The individual and class actions were dismissed on a finding that no prima facie case of discrimination had been established. This is a finding of ultimate fact. "The clearly erroneous standard of appellate review applies to subsidiary facts but does not apply to ultimate facts." *Thompson v. Leland Police Dept.*, 633 F.2d 1111, 1112 (5th Cir. 1980). We make an independent determination of the ultimate issue of discrimination. *Causey v. Ford Motor Company*, 516 F.2d 416 (5th Cir. 1975).

[3] NECO maintains that this case should be limited to a complaint of disparate treatment.[1] Recovery for disparate treatment requires proof of discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Harrell argues the applicability of both the disparate treatment and disparate impact theories.[2] The restricted view advanced by NECO is not

[1] NECO supports this position by referring to paragraph 10 of the complaint which alleges that "...defendant has intentionally engaged in unlawful employment practices."

[2] The Supreme Court noted the difference between disparate treat-

consistent with the liberal treatment of pleadings mandated by the Federal Rules of Civil Procedure.[3] Our review encompasses both bases of recovery.

[4] We are mindful of the necessity that the allegations in the judicial complaint, and the proof offered, must be " 'reasonably related' to charges in the administrative filing," with "no material differences between them..." *Ray v. Freeman*, 626 F.2d 439, 443 (5th Cir. 1980), *cert. denied*, 450 U.S. 997, 101 S.Ct. 1701, 68 L.Ed.2d 198 (1981) (*citing Danner v. Phillips Petroleum Co.*, 447 F.2d 159 (5th Cir.

(Footnote 2 continued)
ment and disparate impact in *Teamsters v. United States*, 431 U.S. 324, 335-36 n.15, 97 S.Ct. 1843, 1954 n.15, 52 L.Ed.2d 396 (1977):

> "Disparate treatment" ...is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. *See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-266, 97 S.Ct. 555, 563, 50 L.Ed.2d 450...
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity...Proof of discriminatory motive, we have held, is not required under a disparate impact theory...*Either theory may, of course, be applied to a particular set of facts.* (Emphasis added.)

[3] Rule 15(b) of the Federal Rules of Civil Procedure provides that "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Both parties introduced statistical evidence which is relevant to both disparate impact and disparate treatment considerations.

1971)). In its determination letter concluding the investigation of Harrell's complaint, the EEOC rejected Harrell's personal complaint of discrimination but stated "at least until the time of this investigation, [NECO] maintained a policy of failing or refusing to hire Black persons as a class in it office positions...because of their Race." We may examine all claims reasonably related to the EEOC investigation.

The Prima Facie Case—Disparate Impact

[5] The facts essential to the disparate impact assessment were stipulated. Between August 1974 and December 1978, NECO received 582 applications for clerical positions; 80 of the applicants were black. A total of 175 persons were hired for clerical jobs, 165 white and 10 black. Of the total hired, 137 (129 white, 8 black) were direct hires; 28 (26 white, 2 black) were in-plant transfers; and 10 (all white) were transferred from other NECO facilities.

Based on these figures, appellant's expert, Dr. Robert Graber, testified that the percentage of black applicants (13.7%) was significantly more than the percentage of black hires (5.7%). Dr. Graber found a disparity near three standard deviations.[4] He testified that a vari-

[4] In *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17, 97 S.Ct. 1272, 1281 n.17, 51 L.Ed.2d 498 (1976), the Supreme Court addressed the statistical methodology of determining and the definition and significance of a standard deviation, which, adapted to the instant case would read:

ance in excess of 2.33 standard deviations is a "highly statistically significant disparity." In this calculation, Dr. Graber took into account both transfers and direct hires. NECO did not maintain records of transfer requests making it impossible to analyze the racial composition of transfer applicants. Viewing the data after deleting the transferees, we find 137 hired, 8 of whom were black. The disparity computed using this data exceeds 2.33 standard deviations.[5]

Appellants offered statistics provided by the Mississippi Employment Security Commission which reflect that 22% of all persons actively seeking clerical employment in the relevant geographic area were black. NECO challenged the reliability of this evidence by showing that the 22% represented the percentage of applications on file at the end of each month and did not take into

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(Footnote 4 continued)

> The measure of the predicted fluctuations from the expected value is the standard deviation, defined for the binominal distribution as the square root of the product of the total number in the sample [either 175 or 137] times the probability of selecting a [black—13.7%] times the probability of selecting a [white—86.3%].

The Supreme Court noted that as a general rule, for a sample the size of that in *Castaneda*, if the difference between the expected value and the observed number is greater than two or three standard deviations, the challenged procedure becomes suspect.

[5] Standard deviations may be calculated from raw data by this mathematical formula:

$$\frac{np - x - .5}{\sqrt{npq}}$$

N equals number hired; p equals percentage of black applicants; x equals number of blacks hired; the .5 is a correction factor for a pool this size; and q equals percentage of white applicants.

consideration individuals who had applied and were placed during the month.

A fluctuation of more than two or three standard deviations undercuts the hypothesis that the hirings were made without respect to race. *Hazelwood School District v. United States*, 433 U.S. 299, 312 n.17, 97 S.Ct. 2736, 2743 n.17, 53 L.Ed.2d 768 (1977). Appellant's statistical basis is not perfect, however, the disparity between the percentages of blacks applying and those hired, considered in light of the total circumstances found in this record, is sufficient to raise a prima facie case of class discrimination. NECO is obliged to show that the disparity resulted from other than racial discrimination. *See Phillips v. Joint Legislative Com., Etc.*, 637 F.2d 1014 (5th Cir. 1981).

NECO's Refutation

NECO first challenges appellant's statistics for combining direct hires with transfers, resulting in a greater disparity than would have existed had transfers been excluded. We are not persuaded. The statistical evidence, considered within the framework of the totality of the evidence presented, is sufficient to make out a prima facie case whether or not the transfers are considered. Including the transfers simply presents a stronger statistical case.

NECO next challenges appellant's hiring figures for failing to take into account four blacks who were offered clerical jobs but declined employment. Good faith offers of

employment would be relevant and material. This contention requires close examination, for if all four of the purported "offerees" are included in the calculations, the statistical disparity only slightly exceeds two standard deviations. If the "offerees" are included and the transferees are excluded, the disparity falls below two standard deviations, belying a prima facie case of discrimination.

NECO maintains that Janice Wilson (Richard), Deborah McGee, Carolyn Reed, and Alan Thompkins refused to accept clerical jobs offered to them. Accepting, *per arguendo*, that these four black applicants were offered employment, the record is devoid of credible evidence that any of the four was offered clerical employment.

The employment applications of the four were offered as defense exhibits. In her application, Janice Wilson (Richard) gave "receptionist/secretary" as her first job preference and "clerical" as her second. An unsigned, undated, unidentified penciled notation in the margin reads "offered job—has accepted employment on other job." NECO's personnel director testified that he had no personal knowledge about the application but assumed that Wilson had been offered a clerical job because that was her stated preference. He conceded it was not unusual for NECO to offer an applicant a job other than that stated as a preference. Indeed, Harrell's experience attests to this practice. Richard testified that she never received a job offer from NECO. The record compels the conclusion that

Richard was not offered a clerical job.

Carolyn Reed's application is even more ambiguous. Reed listed "general office clerk" as her first choice. The bottom margin contains the unidentified notation "Does not want typing position," next to a notation in the same handwriting "could work overtime." NECO's personnel director testified that although he was not employed by NECO at the time, he had heard that Reed had been offered a clerical position and assumed that to be the case because of the above notation about typing. A personnel representative at NECO testified that Reed had been offered a clerical job, but admitted he had no personal knowledge of that happening. Reed denied that she was ever offered a job by NECO. On this record, it cannot be said that Reed was offered a clerical job.

The application of Alan Thompkins bears the margin notation "Called 8/23/77. Not interested now. Attending school." NECO's personnel director testified that he assumed Thompkins was offered a clerical job because that was his indicated preference. The personnel director had no personal knowledge about Thompkins. He did not know the author of the inscribed note.

Deborah McGee's application bears the glossation "never showed up for work." Again the personnel director had no personal knowledge about McGee, her application, or the notation, but assumed she had been offered a clerical job because that was her indicated preference.

Appellant offered the testimony of McGee and Thompkins, but the trial judge would not allow them to testify. Appellant made a proffer that if permitted to testify, each would deny that NECO extended a job offer.

The trial judge found that all four of these applicants had been offered a clerical appointment. This finding is clearly erroneous.

In addition to questioning the basis and methodology of appellant's disparate impact evidence, NECO sought to establish a business justification for its hiring practices. NECO contends that during the initial hiring period, until October 1974, it favored applicants with clerical experience. After this period, NECO suggests that only minimal skills were required. No specific skill level was established; no objective standards were adopted.

[6] In considering an application for transfer into a clerical job, NECO asserts that it took into account the employee's work record, experience, knowledge, skill, education and seniority. If fairly used, these are valid considerations. The employer has the prerogative to establish qualifications. That prerogative is not plenary, however, for "an employer may not utilize wholly subjective standards by which to judge its employees' qualifications and then plead lack of qualification when its promotion process...is challenged as discriminatory." *See Crawford v. Western Elec. Co., Inc.*, 614 F.2d 1300, 1315 (5th Cir. 1980) (*citing Rowe v. General Motors Corp.*, 457 F.2d 348, 358

(5th Cir. 1972)). *Rowe* condemned the subjective evaluations by white foremen of a black employee's "ability, merit, and capacity." 457 F.2d at 353. In the case before us, NECO used all white personnel to subjectively determine whether black outside applicants applying during the initial hiring period were qualified to do clerical work, and whether those subsequently applying possessed "minimally acceptable" skills. NECO's asserted criteria for evaluating transfers were equally subjective because NECO failed to prove they were applied in accordance with any standards or objective criteria. Under these circumstances, NECO's assertion that lack of qualifications justified its failure to hire blacks is insufficient refutation.

We conclude that NECO failed to refute appellant's prima facie showing of discrimination. Obviously appellant's case was based primarily on the statistical evidence. However, our conclusion involves an evaluation of the totality of the evidence presented. We note that NECO hired no black for a clerical position until after the EEOC complaint was filed. Further, NECO's explanation of the coincidental statistical variances strains our credulity.

We conclude that the class should have judgment against NECO and this cause must be remanded for trial on damages and for the fashioning of an appropriate remedy, all in accordance with our further instructions herein.

Individual Claims

In *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the Supreme Court refined the test for disparate treatment originally articulated in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).[6] *Burdine* did not alter the prima facie showing a plaintiff must demonstrate under *McDonnell Douglas*, which requires that a plaintiff show: (1) membership in a minority group; (2) an application for an open job for which he was qualified; (3) rejection; and (4) the employer continued to seek applicants. *Burdine* modified our interpretation of the burden placed on the defendant to rebut the prima facie case. The Supreme Court stated:

> The defendant need not persuade the court that it was actually motivated by the proffered reasons... It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.

101 S.Ct. at 1094. The Court rejected the notion that the employer must show that the person chosen was better qualified than the person rejected. If the defendant succeeds in rebutting the prima facie case, the plaintiff is then

[6] For recent expositions of *Burdine* in this circuit *see Sanchez v. Texas Commission on Alcoholism*, 660 F.2d 658 (5th Cir. 1981); *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750 (5th Cir. 1981); *Jackson v. City of Killeen*, 654 F.2d 1181 (5th Cir. 1981); *Sessions v. Rusk State Hospital*, 648 F.2d 1066 (5th Cir. 1981).

given an opportunity to show that defendant's espoused reasons for the rejection were pretextual.

A. Rose Harrell

[7,8] Harrell demonstrated a prima facie case of employment discrimination. She was black; she applied for a clerical position in August 1974. Although hired for a production job, she was told she would be considered for a clerical assignment when one became available. In October or November of 1974 Harrell was interviewed for a clerical job she never got. Whether a clerical position was open on the exact date Harrell applied is not dispositive, for a "vacancy, within the meaning of the *McDonnell Douglas* test, need not exist on the precise day of application; any vacancies within a reasonable time must be considered as well." *Phillips v. Joint Legislative Com., Etc.*, 637 F.2d at 1030. When Harrell was interviewed, NECO was no longer solely hiring clerical employees with experience. During high school, Harrell took courses in typing and bookkeeping. After graduating she took a vocational course in typing, bookkeeping and filing. During the period between employments at NECO, Harrell took additional vocational training in typing and bookkeeping and worked as a secretary for a year and a half.

It is not possible on the state of this record to conclude, as did the trial judge, that Harrell was not qualified. The district court's finding that Harrell was not qualified is clearly erroneous. We find to the contrary.

McDonnell Douglas requires a rejection, after which applicants are still sought. The record on this point is not subject to question. After Harrell was passed over, NECO continued to hire, hiring whites.

NECO rebuts the prima facie case by contending that the reason Harrell was not transferred was a poor work record. Harrell adequately demonstrated that this was not the true reason for the employment decision. *Texas Dept. of Community Affairs v. Burdine*, 101 S.Ct. at 1095. For example, Harrell's personnel file contains an unsigned "warning" slip bearing an infraction date after Harrell quit working for NECO. The file also contains an absentee warning slip dated six days after Harrell left NECO. We find the other assertions that Harrell failed to make production of some unspecified rate, and that she was cautioned about talking, equally unpersuasive. When Harrell left NECO's employ in March 1975, her record was marked to reflect that she was eligible for rehiring and she was later rehired. We find and hold that the reasons advanced by NECO, to justify their hiring decisions affecting Harrell's application for clerical employment, are pretextual. Harrell is entitled to judgment against NECO. On remand, the court will determine damages and fashion an appropriate remedy.

B. Betty Dagons

Betty Dagons had completed three years of college at Jackson State University, a year of vocational training, and had experience operating an adding machine prior to

applying for a job with NECO. Her manifested interest in clerical work received even less consideration than that given Harrell. She was hired and remained in a production job. NECO contends Dagon was not transferred because of a poor work history. The record does not support this position. Dagons is entitled to relief. On remand appropirate damages and remedy will be determined.

C. Patricia Ann Pittman

Patricia Ann Pittman sought clerical work at NECO in January 1977 and accepted production work when she was told that clerical work was unavailable. Pittman had 1½ years of college, a year of vocational training and two years experience as a bookkeeper and receptionist/PBX operator. Pittman was interviewed for at least two open clerical positions prior to July 1977 and was rejected. NECO contends that Pittman was rejected because of a poor work history. We find no merit in this contention. Pittman is entitled to relief. On remand appropriate damages and remedy will be determined.

D. Tommie Jean Smith Hinton

Tommie Jean Smith Hinton was referred to NECO in March 1975 by the Mississippi State Employment service. The referral related to a clerical position. There was a vacancy. Hinton was interviewed but not hired, ostensibly because she lacked prior experience. Hinton, a high school graduate, had a year of vocational training and secretarial

experience. Thereafter, this position was filled by a white applicant with a similar background. The trial court erred in excluding Hinton's testimony, presumably because NECO had no prior notice that Hinton would testify. Hinton is entitled to relief. On remand appropriate damages and remedy will be determined.

Conclusion

We reverse the judgment of the district court dismissing appellant's individual and class action. We render judgment in favor of appellant, individually, and on behalf of the class, against NECO, on the merits of the discrimination complaint. We remand to the district court for the Southern District of Mississippi for entry of an appropriate decree on liability, for trial on the damages portion,and for the fashioning of such remedy as may be found in order. We instruct the Chief Judge of the Southern District of Mississippi to assign this case on remand to someone other than the original trial judge.

REVERSED, RENDERED and REMANDED WITH INSTRUCTIONS.

APPENDIX "C"

Rose HARRELL, on behalf of herself and all persons similarly situated, Plaintiff-Appellant,

v.

NORTHERN ELECTRIC COMPANY, DIVISION OF SUNBEAM CORPORATION, Defendant-Appellee.

No. 80-3781

United States Court of Appeals Fifth Circuit.

June 21, 1982.

Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 5, 1982, 5 Cir., 1982, 672 F.2d 444)

Before POLITZ and RANDALL, Circuit Judges.*

PER CURIAM:

We have re-examined our holding in light of the subsequent decision by the Supreme Court in *Pullman-*

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* Jack M. Gordon, District Judge of the Eastern District of Louisiana, sitting by designation, was a member of the panel which heard oral argument. Because of his death on March 4, 1982, this case is being decided by a quorum, 28 U.S.C. § 46(d).

Standard v. Swint, __ U.S. __, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). Reviewing the record in accordance with the teachings of *Pullman-Standard v. Swint* relative to ultimate and subsidiary facts, and in light of the other authorities cited, we conclude that, except as modified herein, the result and mandate are correct. They are reaffirmed.

We reaffirm our conclusion that the trial judge erred in his assessment of the disparate impact issue. The error committed was essentially an error of law; the district court erred in its application of controlling legal principles to stipulated facts. The district court also erred in its evaluation of the stipulated facts as they related to the disparate impact issue. To the extent the assessment was factual it was clearly erroneous, Fed.R.Civ.P. 52(a). To the extent the assessment involved legal conclusions, it was legally incorrect.

We also reaffirm our conclusion relative to Rose Harrell's claims of discriminatory treatment. Again, the trial judge's factual assessment was clearly erroneous and his legal assessment was in error.

The Petition for Rehearing asserts that the rendering of judgment in favor of Betty Dagons, Patricia Ann Pittman and Tommie Jean Smith Hinton is not consistent with the bifurcated status of this litigation. On reconsideration, we agree. That portion of the opinion rendering judgment in favor of Dagons, Pittman and Hinton is recall-

ed and such claims as they may present shall be considered on remand when the district court determines the members of the class and determines the damages and other remedies to which the class, and the members thereof, are entitled.

In all other respects, the Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

APPENDIX "D"

42 U.S.C. §2000e-2 provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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No. 82-475

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORTHERN ELECTRIC COMPANY, A DIVISION OF SUNBEAM CORPORATION,
Petitioner,

v.

ROSE HARRELL, ON BEHALF OF HERSELF AND ALL PERSONS SIMILARLY SITUATED,
Respondent.

On A Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied disparate impact analysis to a Title VII class action challenge to a discretely identified employee selection system where prospective employees were allegedly evaluated with reference to facially neutral criteria including degree of prior experience, educational attainment, and skill level.

2. Whether the Court of Appeals properly applied this Court's decision in *Pullman-Standard* v. *Swint*, U.S. ____, 102 S.Ct. 1781, 72 L.Ed. 2d 166 (1982) when it set aside District Court fact findings which were completely devoid of factual support in the record.

3. Whether the Court of Appeals properly declined to remand the case to the District Court for further fact finding when the District Court had analyzed the case under an improper legal standard and where the factual issues relevant to determining liability under the proper legal standard were capable of only one resolution.

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No. 82-475

IN THE

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OCTOBER TERM, 1982

NORTHERN ELECTRIC COMPANY, A DIVISION
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Petitioner,

v.

ROSE HARRELL, ON BEHALF OF HERSELF
AND ALL PERSONS SIMILARLY SITUATED,
Respondent.

On A Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Rose Harrell, plaintiff-respondent, brought this class action in the United States District Court for the Southern District of Mississippi on April 21, 1978 alleging that defendant-petitioner Northern Electric Company (hereinafter NECO) discriminated against her and similarly situated Blacks in selecting clerical employees for its Hattiesburg Mississippi plant in violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e, *et seq.* The District Court certified a class of "all qualified Negro persons who applied for employment in clerical positions with the defendant and who were not hired in a

clerical position because of their race" and ordered that the trial proceed on a bifurcated basis.

The liability issue was tried on two days in July and one day in August, 1980 before United States District Court Judge William Harold Cox who, at the close of all the evidence granted NECO's Fed. R. Civ. P. 41(b) Motion to Dismiss both the individual and class claims (Pet. App. A-8). Harrell appealed this decision to the United States Court of Appeals for the Fifth Circuit which, on April 5, 1982 reversed the District Court with respect to both claims, rendered judgment of liability in favor of the plaintiff and her class, and remanded for trial as to relief (Pet. App. B), *Harrell* v. *Northern Electric Co.*, 672 F.2d 444 (5th Cir., 1982).

The Court of Appeals analyzed Harrell's individual claim under a "disparate treatment" theory, concluded that the District Court's determination concerning the claim was factually clearly erroneous and legally in error and reversed and rendered. Petitioner NECO does not seek review of that determination by this Court.

In reversing the District Court with respect to the class claim, the Court of Appeals first determined that the class claim should be evaluated under a "disparate impact" theory and, using stipulated facts, ascertained that "the disparity between the percentage of blacks applying and those hired, considered in light of the total circumstances found in the record, is sufficient to raise a prima facie case of class discrimination" (Pet. App. B-7) 672 F.2d at 447. The Court of Appeals then examined NECO's attempts at statistical refutation of the prima facie case and concluded that the District Court's fact finding which undergirded the only possible statistical challenge to Harrell's prima facie class case was clearly erroneous (Pet. App. B-10),

672 F.2d at 448.[1] The Court of Appeals finally concluded that, under the circumstances of the case, the record also failed to reveal any legitimate business justification for the challenged practices sufficient to refute the prima facie case (Pet. App. B-11), 672 F.2d 449.

The Court of Appeals remanded the case to the District Court for trial as to damages with instructions that the chief judge reassign the case to a judge other than the original trial judge (Pet. App. B-16), 672 F.2d at 450.

NECO filed a Petition for Rehearing and a Suggestion for Rehearing En Banc. On June 21, 1982, the panel, per curiam, on the Petition for Rehearing, re-examined its decision in light, *inter alia,* of this Court's intervening decision in *Pullman-Standard* v. *Swint,* ____ U.S. ____, 102 S.Ct. 1781, 72 L.Ed. 2d 66 (1982), and reaffirmed its previous decision.[2] The Suggestion for Rehearing En Banc was denied (Pet. App. C), 679 F.2d 31 (5th Cir. 1982).

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[1] The question was whether or not four black jobs seekers were made offers of clerical employment. The issue looms large in the arguments contained in the Cert Petition (Cert. Pet. pp19-22) because it is only when *all four* of these offers are deemed to have been made *and* thirty-eight other stipulated fillings of clerical vacancies are simultaneously disregarded that Petitioner can argue that its own attempt at statistical refutation ekes in under the "two to three standard deviation" measure used in Title VII analysis. Under any other test for statistical significance of the stipulated applicant flow data, significant statistical disparity is established, 672 F.2d at 448.

[2] The Court of Appeals did recall judgment it had previously rendered on behalf of three non-plaintiff class members, agreeing that action was inconsistent with the bifurcated status of the litigation. Neither party contests this determination here.

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals Decided *Harrell* Under The Legal Standard Appropriate To Its Facts.

A. *Harrell* Is Not Inconsistent With Supreme Court Precedent.

Petitioner NECO asks this Court to consider the question of whether the "disparate impact" theory first defined in *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971), can properly be used where there is "no allegation or evidence of an identifiable practice ... which, although neutral on its face, allegedly falls more harshly on a minority group." It also suggests that the Court of Appeals decided this question inconsistently with Supreme Court precedent.

Respondent submits that under its facts the instant case simply does not present that question and that the precedent of this Court cited by Petitioners is fully consistent with the Court of Appeals decision.

In this case, the Court of Appeals specifically found that the lawsuit does challenge a clearly identifiable neutral employment practice: use of an all-white interviewing and evaluating staff subjectively to determine relative qualifications of competing job candidates with reference to neutral criteria including skill level, prior experience, work record, knowledge, education and seniority (Pet. App. B-10-11), 672 F.2d at 448.

Petitioner's real assertion appears to be that this readily identifiable practice may not, despite its disparate effect upon minorities, be challenged under a disparate impact theory simply because it is tainted with subjectivity. This argument attempts to make a virtue out of vice. Employee selection systems so tainted have consistently been evaluated—and condemned—by courts utilizing the disparate impact Title VII analysis. *See Reynolds* v.

Sheet Metal Workers Local 102, 25 FEP 837 (D.C. Cir., 1981), [affirming 498 F.Supp. 952 (DCDC, 1980)]; *Williams* v. *Colorado Springs School District*, 641 F.2d 835 (10th Cir., 1981); *Fisher* v. *Proctor & Gamble Manufacturing Co.*, 613 F.2d 527 (5th Cir. 1980), cert. denied, 449 U.S. 1115 (1981); *Grant* v. *Bethlehem Steel Corp.*, 635 F.2d 1007 (2nd Cir., 1980), cert. denied, 452 U.S. 938 (1981); *Kirby* v. *Colony Furniture Co.*, 613 F.2d 696 (8th Cir., 1980); *Sledge* v. *J. P. Stevens Co.*, 585 F.2d 625 (4th Cir., 1978), cert. denied, 440 U.S. 981 (1979); *Stewart* v. *General Motors Corporation*, 542 F. 2d 445 (7th Cir. 1976), cert. denied, 443 U.S. 919 (1977); and *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5th Cir., 1972).

Petitioner seeks support for its position that the practice challenged in this lawsuit may not be analyzed under a disparate impact theory in this Court's decision in *Furnco Construction Company* v. *Waters*, 438 U.S. 567 (1978). Respondent submits that Petitioner's reliance is misplaced. *Furnco* addressed the issue of an employers rebuttal burden when a prima facie disparate treatment case had been made under *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). The reason stated by the Court for rejecting use of a disparate impact test in *Furnco* was that both the District Court and the Court of Appeals had concluded that there had been no showing that the challenged hiring practices had the requisite disproportionate impact on minorities, *Furnco*, 438 U.S. at 571-72.

As the *Furnco* separate opinion points out, nothing in *Furnco* limits the *scope* of the practices which may be challenged under *Griggs* — indeed, use of prior experience as an employment criterion is specifically cited as "practice" challengeable under *Griggs*, *Furnco*, 438 U.S. at 583. The dissent disagrees only with the Court's conclusion that the *factual* question concerning whether or note a disparate impact actually existed had been finally resolved, *Ibid*, 438 U.S. at 584-5.

This Court's most recent examination of Title VII "disparate impact" analysis, *Connecticut* v. *Teal*, ____ U.S. ____, 102 S.Ct. 2525, 73 L.Ed. 2d 30, (1982), similarly declines to adopt Petitioner's restrictive definition of what "built-in headwinds to minority employment" may be challenged under a disparate impact theory, citing with approval legislative history referring to discriminatory supervisory ratings as an example of devices challengable under *Griggs*, *Connecticut* v. *Teal*, ____ U.S. at ____, n.10, 73 L.Ed. 2d at 139, n.10.

The *Teal* dissent also lends no support to Petitioner's restrictive interpretation of what practices may be examined under a disparate impact analysis: "[O]ur disparate impact cases consistently have considered whether the result of an employers *total selection process* had an adverse impact upon the protected group," ____ U.S. at ____, 73 L.Ed. 2d at 144.

B. *Harrell* Does Not Pose A Conflict With Other Circuit Courts Of Appeals Decisions.

Petitioner's assertion that *Harrell* is in conflict with the decisions of other Courts of Appeals is again founded on Petitioner's misconstruction of the issues actually presented and decided under *Harrell's* facts. None of the purportedly conflicting cases involves *Harrell's* class based challenge to a single clearly identifiable and discrete practice whereby relative employment qualifications are determined subjectively but with reference to neutral criteria.

Heagney v. *University of Washington*, 642 F.2d 1157 (9th Cir. 1981), *Pope* v. *City of Hickory, N.C.*, 679 F.2d 20 (4th Cir. 1982), and *Mortensen* v. *Callaway*, 672 F.2d 822 (10th Cir. 1982) are individual actions involving no class allegations. They incorporate disparate impact theory only as a collateral means to bolster individual claims of disparate treatment under the traditional *McDonnell-Douglas* test.

In *Heagney*, the only "impact" claim was based on comparing the category into which plaintiff's job had been classified with other job categories. However, the evidence showed that the factual basis for plaintiff's discrimination claim related to distinctions made between pay received by men and women *within* the Plaintiff's job category.

In *Pope*, a discharge claim, the "impact" theory raised was rejected on the basis that the statistical samples presented were too small for meaningful statistical evaluation, a necessary prerequisite to a showing of disparate impact. Additionally, there was no evidence of a specific practice or method of employee discharge which allegedly fell more harshly on Pope and other blacks than on whites.

In *Mortensen*, the record was likewise devoid of any showing that a practice comparable to the interviewing process in *Harrell* actually resulted in a disparate underrepresentation of women in the position Mortensen claimed she was discriminatorily denied.

Croker v. *Boeing Co.*, 662 F.2d 975 (3rd Cir. 1981) and *Taylor* v. *Teletype Corporation*, 648 F.2d 1129 (8th Cir.) cert. denied, 102 S.Ct. 515 (1981), are the only class actions cited by Petitioner and they also fail sweepingly to reject the disparate impact analysis in *Harrell* type factual situations.

Factually, *Croker* presents a classic *International Brotherhood of Teamsters* v. *U.S.*, 431 U.S. 324 (1977) case: an across-the-board pattern and practice "disparate treatment" challenge to a wide range of Boeing's employment practices. It is thus distinguishable from *Harrell* on its facts alone. Moreover, the *Croker* Court follows *Teamsters* and agrees with *Harrell* in acknowledging that "either [a treatment or impact] theory may be aplied to a set of facts," 662 F.2d at 991, and in fact reviews the class claims raised by the suit under the impact theory as well. ("With *these* standards of proof in mind we will

proceed to examine the employees contentions ..." [emphasis added]), 662 F.2d at 991.

In *Taylor,* a class based challenge to Teletype Corporation's demotion practices, the only statistical presentation concerning discrimination that was sufficiently refined to be of probative value did not deal directly with the challenged demotions. Rather, the statistics indirectly created inferences respecting demotions through an analysis of *layoffs,* 648 F.2d at 1133-4. The direct showing of "practice-yields-impact" made in *Harrell* was simply not made in *Taylor* and the cases are thereby readily distinguishable from each other.

Respondent submits that in light of the crucial differences between *Harrell* and the cited cases, the purported conflict among the Circuits claimed by the Petitioner is not sufficient to necessitate review of the *Harrell* decision by this Court.

C. The Fifth Circuit Properly Treated *Harrell* As Fully Consistent With Other Fifth Circuit Decisions.

Petitioner next makes the suggestion this Court should grant the requested writ in order to resolve a purported conflict within the Fifth Circuit between the decision in *Harrell* and the decisions in *Pouncy* v. *Prudential Insurance Company of America,* 668 F.2d 795 (5th Cir. 1982) and *Payne* v. *Travenol Laboratories, Inc.,* 673 F.2d 798 (5th Cir. 1982).

Ordinarily, settling claims of intramural conflict is the office of the Court of Appeals sitting on *en banc,* Fed. R. App. Pr. 35(a), 5th Cir. R. 16. Indeed, as petitioner points out, the claimed conflict was raised by petitioner in a suggestion for rehearing *en banc* to the Fifth Circuit, which suggestion was declined (Cert. Pet. p. 15, n.6)

Petitioner interprets the denial of *en banc* review as a failure to resolve the stated conflict. Respondent submits that, on ex-

amination of the decisions, the denial of *en banc* review is better viewed as a determination that no such conflict exists.[3]

In *Pouncy,* the first case claimed to be in conflict with *Harrell,* the Fifth Circuit simply and properly follows this Court's settled rule that across the board challenges to an entire range of employment practices are appropriately treated under a *Teamsters* "pattern and practice" disparate treatment theory. In *Pouncy,* the class claim is that Prudential had "discriminated against its black employees as a class by systematically failing to ... [afford] them the same conditions of employment as [are] given whites" 668 F.2d at 797.

By contrast, in *Harrell,* the class claim is that, by a specific identifiable procedure, NECO discriminatorily denied blacks one particular thing — clerical jobs.

In addressing the proper use of the disparate impact Title VII analysis, *Pouncy* simply identifies the essential elements that a practice challenged under a disparate impact theory must have: 1) The challenged practice must be defined with enough specificity that its causal relationship to a statistical work force imbalance is demonstrable, 668 F.2d at 801; and 2) The challenged practice must be sufficiently identifiable that the

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[3] The Court below had the allegation or conflict before it several times in addition to the request for *en banc* review. NECO drew *Pouncy* to the attention of the panel considering *Harrell,* prior to issuance of the initial decision, by letter submitted under Fed. R. App. Pr. 28(j). The claimed conflicts with *Pouncy* and *Payne* were also raised with the panel in the petition for panel hearing filed simultaneously with the suggestion for rehearing *en banc.* The cases are presumably among the "other authorities cited" in whose light the panel re-examined and affirmed its original holdings (Pet. App. C-2), 679 F.2d at 31.

employer may defend itself by showing legitimate job related business justifications for the practice 668 F.2d at 802.[4]

Obviously, *Pouncy's* allegation of a systematic failure to treat blacks the same as whites does not meet either of the foregoing elements. On the other hand, the practice challenged in *Harrell* satisfies both.

The purported conflict with *Payne* v. *Travenol Laboratories, supra,* is similarly unfounded. Petitioner alleges a conflict between *Harrell* and the statement in *Payne* that Travenol's interviewing could not be viewed as a neutral practice with a disparate effect (Cert. Pet. p.14). This assertion disregards a crucial factual distinction between *Payne* and *Harrell:* There is, in *Payne,* "[no assertion], that Travenol applied distinct, facially neutral criteria to candidates in the interview that operate disproportionately to exclude blacks" 673 F.2d at 816. In *Harrell,* the Court of Appeals identified six such criteria (Pet. App. B-10) 672 F.2d at 450.

D. The Findings Made By The Court Of Appeals Also Sustain A Determination Of Discrimination Under A Disparate Treatment Theory.

Contrary to Petitioner's assertions in Argument IV of its petition, the findings of the Court of Appeals in *Harrell* could also support a conclusion that discrimination was proven under a disparate treatment analysis as well as under a disparate impact analysis.

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[4] It is instructive to note that the *Pouncy* decision cites *Johnson* v. *Uncle Ben's, Inc.,* 657 F.2d 750 (5th Cir. 1981) as a proper disparate impact case, thus throwing some question on petitioner's implication that because *Harrell* is similar to *Johnson* it is "contrary to *Pouncy* and *Payne*" (Cert. Pet. p. 14 n. 5).

Petitioner's initial argument, that the statistical disparity proven must *exceed* the two to three standard deviation level set forth in *Hazlewood School District* v. *The United States,* 433 U.S. 299 (1977) and *Casteneda* v. *Partida,* 430 U.S. 482 (1977), to make out a prima facie case of classwide disparate treatment is simply unsupported. Indeed, Petitioner acknowledges that *Hazlewood* is a proto-type disparate treatment case. At most, where the statistical proof is inconclusive, additional, non-statistical proof from which the requisite inference of intentional discrimination may be drawn may be necessary to sustain a plaintiff's ultimate burden of persuasion. The Court of Appeals in the instant case points to such additional proof, noting in its discussion of the class case that the non-statistical proof was also probative of discrimination and discussing in detail the intentional discrimination against three specific class members (Pet. App. D-11-16), 672 F.2d at 449-50.

Petitioner's second argument, that the Court of Appeals presented it with an "impossible" standard of rebuttal, is similarly without merit. *Harrell* does identify a specific practice and shows where it directly results in disparate minority hiring.

The problem with NECO's attempt at rebuttal is not that the Court of Appeals held it to an impossible standard. Rather, as the Court of Appeals' decision makes clear, the evidence adduced was simply insufficient to meet any rebuttal standard, including the standard of rebuttal under a classwide disparate treatment case. In such a case a defendant has two options; either present a credible statistical rebuttal to the plaintiff's case or offer legitimate job related and non-discriminatory reasons for the actions challenged as discriminatory, see *Payne* v. *Travenol Laboratories, Inc., supra.*

In *Harrell,* the Court of Appeals found specifically that NECO had not only failed at its attempts to refute the statistics

but had also failed to show any legitimate reason for its failure to hire blacks. (Pet. at B-10-11) 672 F.2d 448-9. These findings would be sufficient to sustain a conclusion of class based discrimination under a disparate treatment theory, see *Payne, supra.*

II. The Court Of Appeals Properly Reaffirmed Its Decision In *Harrell* After Re-Examining The Case Under *Pullman-Standard* v. *Swint*, ____ U.S. ____ 102 S.Ct. 1781, 72 L.Ed. 2d 66 (1982).

In *Pullman-Standard* v. *Swint, supra,* this Court reversed a decision of the Fifth Circuit Court of Appeals for improperly failing to use the "clearly erroneous" standard in reviewing District Court findings concerning a pure question of fact. In that case, the Court of Appeals had improperly set aside a District Court fact finding respecting discriminatory intent without first ascertaining and determining that the District Court's finding of fact was clearly erroneous under Fed. R. Civ. Pr. 52.

In the instant case, petitioner argues that *Swint* has been given short shrift because the Court of Appeals *did* use a clearly erroneous standard. This contention is not supported by the facts or the law.

Swint reaffirms three basic principles respecting use of the clearly erroneous rule: First, the clearly erroneous rule must be applied by Courts of Appeals when reviewing District Court findings respecting all pure fact questions—regardless of whether the question is one of "ultimate" or "subsidiary" fact, ____ U.S. ____ at ____ 72 L.Ed. 2d at 79.

Second, the clearly erroneous rule does not apply to conclusions of law and therefore, if a Court of Appeals finds that a District Court's fact findings rest on an erroneous view of the

law they may be set aside on that basis. ____ U.S. ____ at ____, 72 L.Ed. 2d at 79.

Third, if the clearly erroneous rule is applicable and the question being examined is a pure question of fact, the Court of Appeals may not set aside a District Court finding simply because the District Court "*might* have reached another conclusion," ____ U.S. ____ at ____, 72 L.Ed. 2d at 81. This third teaching is simply a restatement of the longstanding principle that a District Court's fact findings may only be set aside when there is no support for the finding in the record or where "on the entire evidence [the appellate court] is left with a definite and firm conviction that a mistake had been committed", *United States* v. *United States Gypsum Company*, 333 U.S. 364, 395 (1948).

Petitioner's only objection under *Swint* appears to be that the Court of Appeals somehow violated the third teaching. This contention is unfounded.

The Court of Appeals held, and, indeed, petitioner must concede, that under the statistical standards set forth in *Hazelwood, supra,* and *Casteneda,* the plaintiff in this case made out a prima facie case of discrimination unless the District Court had properly employed a statistical analysis which both *excluded* 38 persons who had obtained initial clerical jobs by transferring from other positions at NECO and *included* four black people who were purportedly offered, but rejected, clerical jobs (Cert. Pet. p.21-22), 672 F.2d 447-8, see also Footnote 1, *supra.*

Properly ascertaining that the question of exclusion of the transfers did not make a legally significant statistical difference unless the inclusion of the four purported clerical offers was proper, the court of Appeals focused on the District Court's

fact finding regarding the offers, (Pet. App. B-7-8), 672 F.2d at 447.[5]

The Court of Appeals recognized that the determination of whether or not clerical job offers were made to four black applicants was a pure question of fact. In conformity with *Swint*, therefore, it used the clearly erroneous standard of review and found that "the record is devoid of credible evidence that any of the four were offered clerical employment" (Pet. App. B-8), 672 F.2d at 447. On the basis of this conclusion, the Court of Appeals held that the trial court's finding that all four of these applicants had been offered clerical employment was clearly erroneous (Pet. App. B-10), 672 F.2d at 449.

Far from disregarding or violating the letter or spirit of *Swint*, the Court of Appeals in *Harrell* not only clearly and specifically used the clearly erroneous rule in its initial decision, but it also reviewed its original opinion after *Swint* came down and reaffirmed its decision in light of *Swint* (Pet. App. C), 679 F.2d 31.

Respondent submits that this conclusion was fully in line with this Court's opinion in *Swint* and that there is thereby no basis for granting the Writ sought by petitioner.

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[5] The Cert Petition contains an extensive discussion of what "the record" purportedly shows in this regard (Cert. Pet. pp. 19-22, nn. 10, 12). As Appendices A and B to the Cert Petition reveal, these allegations go far beyond what the District Court found in this regard and are in fact directly contrary to conclusions reached by the Court of Appeals which examined the entire transcript in this matter.

III. The Court Of Appeals Properly Determined That Discrimination Had Occurred In This Case And Correctly Remanded The Matter To The District Court Solely For The Formulation Of The Appropriate Remedy.

Petitioner's final argument concedes, *per arguendo*, that the District Court applied an improper legal standard and that the Court of Appeals employed the proper one. Petitioner nonetheless argues that this Court should grant the Writ of Certiorari simply because the Court of Appeals directed entry of judgment of liability rather than remanding the case to the District Court for new findings of fact respecting liability.

This argument is founded on two mistaken assertions: 1) That the disparate impact theory on which the Court of Appeals based its decision had not been raised by the plaintiff before the District Court; and 2) That the record respecting liability, once the clearly erroneous fact findings of the District Court had been set aside, permitted more than one resolution of the factual issue.

As the Court of Appeals found on the basis of uncontroverted evidence, the disparate impact theory has been an issue since the case was first considered by the Equal Employment Opportunity Commission (Pet. App. B-4-5) 672 F.2d at 446. The plaintiff's complaint specifically pleaded the EEOC's determination relative to the impact issue and her trial briefs strenuously argued the disparate impact class claim. Petitioner's assertions to the contrary are simply unsupported.[6]

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[6] In accordance with his usual procedures, the District Court Judge who tried this case did not hold a pre-trial conference or enter a pre-trial order. Thus, the pleadings and the Briefs are the only indicia of the issues before the District Court.

Despite the fact that it was asserted, the District Court chose not to use the disparate impact theory in deciding the case. The Court of Appeals found this to be the chief error of law made by the District Court.

This Court has consistently held that determination of when issues may be resolved on appeal without a remand to the District Court is to be "left primarily to the discretion of the Court of Appeals to be exercised on the facts of the individual cases" *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976). In general, where the record is sufficient to support the Appellate Court's legal analysis, and the facts in the record are capable of only one resolution, the Appellate Court may properly exercise its discretion and resolve issues not previously passed on by the trial court, *Brown* v. *Illinois*, 422 U.S. 590 (1975), *Pullman-Standard* v. *Swint, supra*, ____ U.S. at ____; 72 L.Ed. 2d at 82.

In the instant case, the Court of Appeals was well within its discretion in directing entry of a judgment finding liability for employment discrimination on the impact theory.

First, as both decisions of the Court of Appeals make clear, the District Court findings of fact were not set aside merely because they were decided under an erroneous view of the law. The fact findings made by the District Court were found to be clearly erroneous and unsupported by the record. Moreover, the statistical data necessary to determining the existence of a disparate impact were, with the exception of the question of four purported clerical job offers, stipulated by the parties, (Pet. App. B-5) 672 F.2d at 446, and therefore capable of only one factual resolution. As to the four alleged clerical job offers, either the job offers were made or they were not. The Court of Appeals concluded that the finding that the clerical job offers were made was clearly erroneous. Thus, there remained only one possible resolution of that factual issue—the offers were not made.

Also, it should be noted that the Court of Appeals decision does not finally dispose of the class claims. It simply directs entry of judgment of liability on behalf of the class as a whole. The determination of what, if any, relief each individual class member may be entitled to, as well as any generalized injunctive relief, is left for determination by the District Court on remand (Pet. App. B-16) 672 F.2d at 450.

Under the foregoing circumstances, Respondent submits that petitioner's arguments respecting failure to remand are insufficient to warrant review of the *Harrell* decision by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alison Steiner, counsel of record for Respondent, hereby certify that I have caused three copies of the above and foregoing Brief for the Respondent in Opposition, to be served by United States Mail upon counsel of record for Petitioner at the following address:

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This the 29th day of October, 1982.

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